



DEPARTMENT OF DEFENSE

48 CFR Parts 225 and 252

[Docket DARS-2021-0018]

RIN 0750-AL29

Defense Federal Acquisition Regulation Supplement: Modification of Small Purchase Threshold Exceptions (DFARS Case 2021-D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021.

DATES: Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, Telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 53931 on September 29, 2021, to implement section 817 of the National Defense Authorization Act (NDAA) of Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 817 amends 10 U.S.C. 2533a (commonly known as the "Berry Amendment"), by reducing the dollar threshold at which an acquisition is excepted from the

source restrictions of the Berry Amendment from the simplified acquisition threshold (SAT) to an amount not to exceed \$150,000.

DFARS 225.7002 identifies the domestic source restrictions of 10 U.S.C. 2533a on food, clothing, fabrics, fibers, hand or measuring tools, and flags, unless an exception applies. DFARS 225.7002-2, Exceptions, has historically referred to "actions at or below the small purchase threshold," rather than a specific dollar value, as an exception to the domestic source restrictions of the Berry Amendment. As a result, each time the SAT increased, the exception threshold also increased to align with the new SAT, to include the most recent SAT increase to \$250,000. Federal Acquisition Regulation (FAR) Case 2018-004, published July 2, 2020 (85 FR 40064) raised the SAT at FAR 2.101 from \$150,000 to \$250,000.

Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. One respondent provided a comment that did not support the rule for reasons that were outside of the scope of this rule. A discussion of the comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

There are no changes from the proposed rule as a result of public comments.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Some respondents supported the rule.

Response: DoD acknowledges the support.

2. Splitting Requirements

Comment: Respondents are concerned that without expressly stating that contracts cannot be broken into smaller contract actions, contracting officers will split requirements to avoid applying the restrictions set forth in 10 U.S.C. 2533a.

Response: Basic contracting officer training already provides direction to the contracting workforce about splitting contract actions to avoid application of regulatory requirements. Additional direction is unnecessary to ensure compliance with this rule.

C. Other Changes

Minor changes are made in paragraph (m) of DFARS 225.7002-2 to remove text that is not necessary. In paragraph (c) of DFARS clause 252.225-7012, Preference for Certain Domestic Commodities, minor changes are made to delete an acronym that is no longer needed and to clarify that the reference to "225.7002-2(a)" is a reference to DFARS 225.7002-2(a).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule amends the applicability of the following DFARS clauses: (1) 252.225-7006, Acquisition of the American Flag;

(2) 252.225-7012, Preference for Certain Domestic Commodities; and (3) 252.225-7015, Restriction on Acquisition of Hand or Measuring Tools. DoD does intend to apply the rule to contracts valued above \$150,000 but at or below the SAT. The clauses impacted by the rule are already prescribed for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products including COTS items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does intend to make that determination. Therefore, this rule will apply above \$150,000 but at or below the simplified acquisition threshold.

B. Determination

DoD plans to apply the rule to contracts valued above \$150,000 but at or below the SAT for the following DFARS clauses: (1) 252.225-7006, Acquisition of the American Flag; (2) 252.225-7012, Preference for Certain Domestic Commodities; (3) 252.225-7015, Restriction on Acquisition of Hand or Measuring Tools.

Not applying these clauses to contracts valued above \$150,000 but at or below the SAT would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule, which is to increase the number of acquisitions subject to the domestic source restrictions at DFARS 225.7002 by reducing the volume of procurements subject to the exception at DFARS 225.7002-2(a). The clauses already apply to commercial products including COTS items.

IV. Expected Impact of the Rule

DFARS 225.7002 identifies the domestic source restrictions of 10 U.S.C. 2533a on food, clothing, fabrics, fibers, hand or measuring tools, and flags, unless an exception at DFARS 225.7002-2 applies. Acquisitions valued below the SAT, currently defined at FAR 2.201 as \$250,000, are excepted from the domestic source restrictions of the Berry Amendment.

This rule implements section 817 of the NDAA for FY 2021 by reducing the exception threshold from the SAT to \$150,000. DoD expects the reduction required by section 817 to result in an increase in the number of procurements of domestically sourced end products that are subject to 10 U.S.C. 2533a.

DoD estimates that approximately 970 procurements valued between \$150,000 and the SAT of \$250,000 are awarded to an estimated 400 entities annually, based upon data obtained from the Federal Procurement Data System (FPDS) for fiscal years 2018 through 2020. Until the final rule for FAR case 2018-004 (85 FR 40064), which increased the SAT from \$150,000 to \$250,000, became effective on August 31, 2020, these entities were required to comply with domestic source restrictions of the Berry Amendment, including the \$150,000 exception threshold. It has only been since August 31, 2020, that these entities have had the benefit of the higher exception threshold (i.e., the SAT of \$250,000). DoD assumes that some of these entities may have adjusted their procurement sources in the short time since the threshold was raised, while some may have continued with their established supply chains. There is currently no data source that would identify the entities that made adjustments and would have to return to their previous practices.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of

promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and to the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule amends the DFARS to implement section 817 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 817 reduces the dollar threshold exception at DFARS 225.7002, which implements 10 U.S.C. 2533a (commonly known as the "Berry Amendment"), from the simplified acquisition threshold (SAT) to an amount not to exceed \$150,000.

The objective of the rule is to increase the number of procurements subject to the domestic source requirements at DFARS 225.7002 by reducing the number of procurements subject to the exception at DFARS 225.7002-2(a).

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule is expected to affect small entities that participate in procurements subject to the domestic source restrictions at DFARS 225.7002. However, DoD does not expect a significant change in the number of actions awarded to small entities resulting from the reduction in the threshold from the current SAT of \$250,000 to \$150,000. To assess the impact of this reduction, data was obtained from the Federal Procurement Data System (FPDS). According to FPDS for fiscal years 2018 through 2020, DoD awarded an average of approximately 970 applicable actions valued above \$150,000 but below the SAT. Of those actions, an average of 200 contract actions was awarded to approximately 72 unique small entities.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

There are no practical alternatives that will accomplish the objectives of the statute.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 225 and 252

Government Procurement

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Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

225.7002-2 [Amended]

2. Amend section 225.7002-2:

a. In paragraph (a), by removing “at or below the simplified acquisition threshold” and adding “not exceeding \$150,000” in its place;

b. In paragraph (j)(2), by removing “simplified acquisition threshold” and adding “threshold at 225.7002-2(a)” in its place;

c. In paragraphs (m)(1)(ii) and (iv), by removing “Product or Service Group (PSG)” and adding “PSG” in its place.

225.7002-3 [Amended]

3. Amend section 225.7002-3, in paragraphs (b) and (c), by removing “simplified acquisition threshold” and adding “threshold at 225.7002-2(a)” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225-7012 [Amended]

4. Amend section 252.225-7012 by—

a. Removing the clause date “(MAR 2022)” and adding “(APR 2022)” in its place;

b. In paragraph (a), in the definition of “Structural component of a tent”, redesignating paragraphs (i) and (ii) as paragraphs (1) and (2), respectively, and at the end of the newly redesignated paragraph (1) removing the semicolon and adding “; and” in its place;

c. In paragraph (c)(1), removing “(FAR)”;

d. In paragraph (c)(2)(ii), removing “simplified acquisition threshold in FAR part 2” and adding “threshold at Defense Federal Acquisition Regulation Supplement 225.7002-2(a)” in its place.